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Supreme Court, U.S.
FILED
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

HARLLEL B. JONES,
Petitioner,

vs.

ROBERT SHANKLAND, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION

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ORDER OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-3623

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(Filed October 20, 1986)

HARLLEL B. JONES,

Plaintiff-Appellant,

v.

ROBERT SHANKLAND, ET AL.,

Defendants-Appellees.

O R D E R

BEFORE: ENGEL, MERRITT AND KENNEDY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

John P. Hehman, Clerk

DECISION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84-3623

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harllel B. Jones,

Plaintiff-Appellant,

v.

Robert Shankland, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed September 2, 1986
[Published at 800 F.2d 77
(6th. Cir. 1986)

Before: **ENGEL, MERRITT and KENNEDY,** Circuit Judges.

ENGEL, Circuit Judge. Harllel B. Jones appeals a judgment of the United States District Court for the Northern District of Ohio, granting defendants' motions to dismiss and for summary judgement in his civil rights action. In this appeal, Jones contends that the district court

BEST AVAILA

erroneously held that his claims against four defendants were barred by the applicable statute of limitations and the remaining county defendants were absolutely immune from civil suit. We affirm.

A complete recital of events which brought about Jones' conviction of second degree murder in the Ohio state courts and his ultimate release upon issuance of a federal writ of habeas corpus is chronicled in **Jones v. Jago**, 428 F. Supp. 405 (N.D. Ohio 1977), **aff'd**, 575 F.2d 1164 (6th Cir.), **cert. denied**, 439 U.S. 883 (1978); and **Jago v. United States District Court**, 570 F.2d 618 (6th Cir. 1978).

I.

On October 12, 1971, Harllel Jones was arrested and held to answer an indictment charging him with first degree murder and shooting with intent to kill.

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The state maintained that Jones had instigated the fatal shootings of two men on August 7, 1970, in retaliation for the death of a member of a political group which he had organized. On March 28, 1972, a jury convicted Jones of second degree murder and of shooting with intent to kill or wound. After exhausting his state remedies, Jones filed a petition for habeas corpus in the federal court in Cleveland charging, among other constitutional errors, that the prosecution had unconstitutionally suppressed exculpatory evidence.

During Jones' prosecution the state had refused to disclose a statement which the defense specifically requested. That statement, by fifteen year old juvenile who had been present at the August 7 shootings, contained that person's recollections of that evening but made no mention of any involvement on the part of Jones. On February 10, 1977, the

district court granted Jones' writ, **Jones v. Jago**, 428 F. Supp. 405 (N.D. Ohio 1977), and on June 24, 1977, Jones was released from prison on bond. On February 2, 1978, the Sixth Circuit rejected the prosecution's appeal of Jones' release, **Jago v. U.S. District Court, Northern District of Ohio, East Division, at Cleveland**, 570 F.2d 618 (6th Cir. 1978), and on May 3, 1978, the Sixth Circuit affirmed the district court's decision granting a conditional writ of habeas corpus, **Jones v. Jago**, 575 F.2d 1164 (6th Cir. 1978). The state's petition for a writ of certiorari was denied by the United States Supreme Court on October 2, 1978. **Jago v. Jones**, 439 U.S. 883 (1978). Finally, on February 12, 1979, the district court entered a "final" order unconditionally releasing Jones, the state having determined not to retry him.

On October 29, 1979, Jones filed a

civil action in the United States District Court under 42 U.S.C. §§ 1983, 1985(2) and (3) and 1986. He alleged that the earlier prosecution violated his rights under the First, Fourth, Fifth, Sixth, Eight, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments. He also alleged pendent state claims of false imprisonment, intentional infliction of emotional distress, malicious prosecution, abuse of process, invasion of privacy and defamation. Jones named eleven defendants. Three defendants, Robert Shankland, Thomas Mahon and James Fuerst, were officers of the police department of the City of Cleveland and were sued individually. Defendants William H. Greene, Jr. and William Kelley were each agents of the Federal Bureau of Investigation assigned to the Cleveland Field Office of the FBI. Green and Kelley were sued individually. Robert Perry was alleged to be an

undercover agent who worked for the Federal Bureau of Investigation as an informant. He was sued individually. Defendants John T. Corrigan, Robert E. Feighan and William J. Coyne were all employed by Cuyahoga County. Corrigan was the duly elected prosecutor for the county. Feighan and Coyne were assistant Cuyahoga County prosecutors. Corrigan, Feighan and Coyne were sued in both their individual and official capacities. Also named were the "Cuyahoga County Prosecutor's Office" and Defendant Cuyahoga County, the "Parent-Governmental" entity of the Cuyahoga County Prosecutor's Office. The liability of the prosecutor's office and the county was alleged to be "predicated upon the actions of defendant Corrigan."

Jones' lengthy complaint alleged that the named defendants acted either solely or in conspiracy to infringe his First Amendment rights, failed to

disclose exculpatory information, procured false testimony, failed to correct perjured testimony, caused a conflict of interest for defense counsel and then did not disclose that conflict to Jones, put a "spy" in the defense camp and "covered up" the foregoing allegedly unconstitutional actions.

On July 2, 1984, Chief Judge Frank J. Battisti granted the city and federal defendants' motions to dismiss and a motion for summary judgment which had been filed by the county defendants. He held that Jones' claims against the city and federal defendants were governed by the one-year statute of limitations contained in Ohio Rev. Code § 2305.11. Concluding that Jones' cause of action accrued at the very latest on October 2, 1978, when the Supreme court denied certiorari, Judge Battisti found the suit time-barred. While Judge Battisti also concluded that the county defendants had

waived the statute of limitations defense by not raising it in their pre-answer motion to dismiss, he nonetheless granted the county defendants' motion for summary judgment on the ground that they were entitled to absolute immunity for their actions in prosecuting the criminal case.

On appeal, Jones contends that the district court should have examined each claim made to determine which Ohio statute of limitations provision should have been applied. He argues also that his cause of action did not accrue until February 12, 1979, when the district court granted an unconditional writ or thirty days thereafter when the state's right to appeal that order expired. Moreover, he claims that the statute of limitations was tolled by Ohio Rev. Code §2305.16 because although physically free since June 24, 1977, he had remained constructively "imprisoned" under the restrictions of bail until the issuance

of the unconditional writ. Finally, he argues that the county defendants were not immune from suit.

II.

We first conclude that Chief Judge Battisti was entirely correct in his determination that the individual county prosecutors were absolutely immune from personal liability in damage suits brought pursuant to 42 U.S.C. § 1983. **Imbler v. Pachtman**, 424 U.S. 409 (1976).

Jones argues that many of the claims charged against those in the prosecutor's office relate to their role as administrator or investigative officers, rather than as advocates. His complaint contains essentially allegations of failing to disclose exculpatory and other information concerning witnesses, procuring false testimony, failing to correct perjured testimony, causing a conflict of interest for defense counsel,

not disclosing that conflict to Jones, putting a "spy" in the defense camp, and "covering up" those allegedly unconstitutional actions.

The foregoing actions appear to us to be clearly within the scope of immunity contemplated by the Supreme Court in **Imbler**. The use of perjured testimony and the non-disclosure of exculpatory information are certainly entitled to absolute immunity. **See Imbler**, 424 U.S. at 431 n.34. The conflict of interest problems and the spy allegations would also seem to be related to the acts of an advocate and thus come within the area of prosecutorial immunity as do the cover up allegations which merely appear to be restatements of the prosecution's claimed failure to disclose exculpatory information.

III.

The trial judge's determination that

Jones' claims against the remaining defendants were governed by Ohio's one-year statute of limitations as contained in Ohio Rev. Code § 2305.11 has since been fully reaffirmed by the Supreme Court's determination in **Wilson v. Garcia**, 105 S. Ct. 1938 (1985), that actions under section 1983 are best characterized as personal injury actions and subject to the state statutes of limitations for those types of claims. While there are two conceivable statutes of limitations in Ohio bearing on personal injury claims, one for negligent claims and one for intentional claims, our court in **Mulligan v. Hazard**, 777 F.2d 340 (6th Cir. 1986), has recently held, consistent with Judge Battisti's ruling here, that the one-year limitations period of Ohio Rev. code § 2305.11 is more appropriate. We agree and accept **Mulligan v. Hazard** as **stare decisis** in our circuit on the question of Ohio's

most nearly analogous statute. **Mulligan v. Hazard** is also authority in our circuit that **Wilson v. Garcia** is to be applied retroactively, dispelling any question of the applicability of the one-year period to the present case.

IV.

Having found that the one-year statute is applicable, the question remains whether Jones' civil rights action, which was commenced in the district on October 29, 1979, was nevertheless timely as having been commenced within one year from the time it accrued. In support of this claim, it is argued that the statute should not begin to run until February 12, 1979, the date on which the court entered a "final" order unconditionally releasing Jones after the state determined not to retry him. We disagree.

In support of the latter position,

Jones claims first that accrual of his cause of action was tolled by his imprisonment. Under Ohio Rev. Code § 2305.16, "If a person entitled to bring any action mentioned in such sections [including section 2305.11], unless for penalty or forfeiture, is at the time the cause of action accrues,...imprisoned ...such person may bring it within the respective times limited by such sections after such disability is removed. . .."

In actions brought under section 1983, state tolling statutes apply where the most nearly analogous state statute of limitations is borrowed, to the extent that the tolling provisions are not inconsistent with federal policy underlying section 1983. **Board of Regents of the University of the State of New York v. Tomanio**, 446 U.S. 478, 484-85 (1980); **see also Austin v. Brammer**, 555 F.2d 142 (6th Cir. 1977). It is undisputed, however, that Jones was

physically free from restraint since his release on June 24, 1977. **Jago v. United States District Court**, 570 F.2d 618, 619 n.1 (6th Cir. 1978). We are cited no authority in Ohio's courts or otherwise to the effect that the statutory period was nevertheless still tolled because thereafter and until final release on February 12, 1979, Jones was under the "restraint" of bail.

Jones has supplied no support for his proposition that the disability of imprisonment referred to in section 2305.16 includes time spent on bail and logic does not support such a claim. The concerns prompting the tolling of a statute while one is in prison simply are not applicable when the party is free on bail. He is thereafter not denied any access to counsel, nor is he hindered from investigating the facts concerning his claim or from starting suit on his own behalf. **Accord Kaiser v. Cahn**, 510

F.2d 282 (2d Cir. 1976)

Finally, Jones claims that the statute of limitations could not begin to run nor could his cause of action accrue until there had been a full termination his habeas corpus proceedings, relying primarily upon **Preiser v. Rodriguez**, 411 U.S. 475 (1973). There Justice Stewart held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus," 411 U.S. at 500, and not an action under 42 U.S.C. § 1983. While the Court found that to allow a section 1983 suit to proceed in cases challenging the propriety of a state prisoner's incarceration would frustrate the congressional intent reflected in the habeas statutes, it restricted its

holding to cases seeking only equitable relief. In this action, of course, only damage relief is sought by Jones, although it is for deprivations which arose not from the conditions of his confinement, but from allegations going to the constitutionality of the proceedings which led to his incarceration. Nonetheless, the trial court recognized that exhaustion of remedies is not a prerequisite to a section 1983 action. The prisoner in **Preiser** had argued that the court's holding could deprive them of any opportunity to receive damages if no damage remedy was available at state law. They based their argument upon the principles that damages are not available in federal habeas corpus proceedings, and that a subsequent section 1983 could be barred by **res judicata** if the state court determination is adverse to their claims. The Court responded:

> The answer to this contention is that the respondents here sought no damages, but only equitable relief--restoration of their good-time credits--and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release--the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement or prior exhaustion of state remedies. Cf. **Ray v. Fritz**, 468 F.2d 586 (CA2 1972).

411 U.S. at 494. The Court further noted that a suit for damages under section 1983 and a habeas claim may be pressed simultaneously in federal court:

> If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his

> claim relating to the conditions of his confinement. **Id.** at 499 n.14.

In **Wolff v. McDonnell**, 418 U.S. 539, 553-55 (1974), the Supreme Court interpreted this language in **Preiser**, concluding that a section 1983 suit for damages may be litigated outside a habeas proceeding. In **Wolff**, like **Preiser**, a state prisoner alleged that he and others had been unconstituionally disciplined and thereby deprived of "good time" credit. However, unlike the plaintiff in **Preiser**, the plaintiff in **Wolff** sought declaratory relief and money damages as well as an injunction. The Supreme Court held that the injunctive relief sought was foreclosed, as in **Preiser**, but that the declaratory judgment and damage claims could proceed:

> **Preiser** expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S. at 499 n.14. Respondent's damages claim was therefore properly before the District Court and

> required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgement as a predicate to a damages award would not be barred by **Preiser** . . .
>
> We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled.

418 U.S. at 554-555 (footnotes omitted).

While the language in **Wolff** could be read as holding that a section 1983 suit for damages may be brought even if the damage claim is dependant upon the constitutionality of the prisoner's confinement, the Supreme Court recently acknowledged that it has not yet determined whether "a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court

attacks on the conviction itself." **Tower v. Glover**, 467 U.S. 914, 923 (1984).

In **Hadley v. Werner**, 753 F.2d 514 (6th Cir. 1985), a panel of our court followed the decision of the First Circuit in **Guerro v. Mulhearn**, 498 F.2d 1249 (1st Cir. 1974), by holding that in a section 1983 suit a federal court must "stay its hand where disposition of the damage action would involve a ruling implying that a state conviction is or would be illegal." 753 F.2d at 516 (quoting **Guerro**, 498 F.2d at 1252). Our circuit in **Hadley**, concluding that the reasoning of **Preiser** combined with the policy considerations underlying **Younger v. Harris**, 401 U.S. 37 (1971), required the district court to stay its hand "where disposition of the damage action would involve a rule implying that a state conviction is or would be illegal," 753 F.2d at 516, and ordered as specific relief in that case the vacation of the

district court's ruling that the plaintiff there had failed to state a claim upon which relief could be granted. At the same time, it affirmed the district court's dismissal of Hadley's claim, without prejudice however to his opportunity to refile his claim under section 1983 if and when he established through a writ of habeas corpus that he was denied a constitutional right. The specific relief accorded in **Hadley** would normally raise some question whether, therefore, the accrual of a petitioner's cause of action for damages based upon constitutional violations which also affected his liberty, would be suspended during the entire time necessary to pursue the habeas action to a successful conclusion. In other contexts, however, the Supreme Court in **Fornaris v. Ridge Tool Co.**, 400 U.S. 41 (1970), and our circuit in **Muskegon Theatres, Inc. v. City of Muskegon**, 507 F.2d 199 (6th Cir.

1974), held it error to have dismissed outright, even without prejudice, causes of action brought under the Civil Rights Act where it was determined that abstention pending the resolution of state proceedings was appropriate. There is support and logic for support in both views. We need not, however, decide here whether a dismissal without prejudice or the retention while abstaining from action is preferable for we determine that in all events the habeas corpus case had been fully concluded more than one year before the suit was started.[1]

As noted by the district court, the Supreme Court denied certiorari on

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[1] **See also Johnson v. Railway Express Agency**, 421 U.S. 454 (1975), where, in a different context, the court held that commencement of agency proceedings under Title VII, 42 U.S.C. §§ 2000e, **et seq.**, did not toll the limitations period for a claim brought under 42 U.S.C. § 1981 challenging the same conduct. The Court suggested as a possible solution "that the plaintiff in his § 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation

October 2, 1978; on October 16, 1978, Justice Stewart refused to suspend the denial of the application for writ of certiorari. Without necessarily holding that the one year period should be calculated as running from either of those dates in contrast to some earlier date, it is sufficient to say that under any reasonable construction of finality, Jones had had well over a year in which to act before commencing the district court suit on October 29, 1979. The district court's order of February 12, 1979, in final conclusion of the habeas proceedings, was nothing more than an administrative act of closing the file. The result had already been fully and totally adjudicated. We see no reason to string out the time for the statute to run by conceiving of every possible method by which the ultimate result in

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and voluntary compliance have been completed." 421 U.S. at 465.

the habeas case might have been forestalled.

AFFIRMED.

JUDGMENT ENTRY OF THE U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

(Filed July 2, 1984)

HARLLEL B. JONES,	)	C79-2040
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
ROBERT T. SHANKLAND, et al.,	)	
	)	
Defendants.	)	Judgment Entry

BATTISTI, C.J.

In accordance with the Memorandum Opinion and Order filed on July 2, 1984,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the County defendants' motion to dismiss, the Federal defendants' motion to dismiss and the City defendants' motion for summary judgment are hereby granted.

IT IS FURTHER ORDERED that the action against defendant Robert Perry is hereby dismissed.

Frank J. Battisti
Chief Judge

OPINION AND ORDER OF THE U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
(FILED JULY 2, 1984)

HARLLEL B. JONES	:	C-79-2040
Plaintiff,	:	
-vs-	:	MEMORANDUM
	:	OPINION AND
ROBERT T. SHANKLAND, et al.	:	ORDER
Defendants	:	

Battisti, C.J.

Before the Court are motions to dismiss and for summary judgment filed by various defendants in the above-captioned matter. Originally, the case was assigned to U.S. Magistrate David Perelman for pretrial supervision pursuant to 28 U.S.C. § 636(b)(1)(B). On July 14, 1983, the Magistrate submitted a Report and Recommendation Decision which analyzed the issues raised in defendants' motions and included a preliminary determination thereon. In conformity

with Local Rule 19.04(3), plaintiff filed timely objections to the Report and Recommended Decision. Thereafter, defendants filed briefs in opposition to plaintiff's objections and requested that the Court adopt the findings of fact and conclusions of law recommended by the Magistrate.

The Court finds the manner in which defendants investigated and prosecuted Plaintiff Jones leaves much to be desired. Nonetheless, upon due consideration, the Court grants the Motion of the City, County and Federal defendants for the reasons set forth below.

I.

BACKGROUND

A.

In order to fully comprehend the issues currently before the Court, it is essential to set out the history of this

case. The events out of which this matter developed began to unfold on October 12, 1971, when the plaintiff, Harllel Jones, was arrested pursuant to an indictment charging him with first degree murder and with shooting with intent to kill or wound. The government maintained that plaintiff had instigated the fatal shootings of John Howard Smith and Harlow Tate early on the morning of August 7, 1970. The prosecution charged that, on the evening of August 6, 1970, plaintiff had called a "red-alert" meeting of a political organization known as the Afro Set. At that meeting, plaintiff allegedly urged the members of the organization to retaliate for the death of an Afro Set member who had been fatally shot by a security guard. According to the prosecution, the retaliation was to take the form of random attacks on innocent security guards and police officers.

In support of its theory, the prosecution primarily relied on the testimony of Robert Perry, a defendant herein, who actually committed the fatal shootings. Perry, who had jointed the Federal Bureau of Investigation (F.B.I.) as a confidential informant several months before Jones' trial, testified at the trial that at the June 6 red-alert meeting, Jones had ordered certain Afro Set members to commit the shootings. Perry's testimony was the key evidence linking the Afro Set members with the August 7 shootings and establishing that those members were acting at petitioner's behest. Perry was actually Jones' co-defendant in the criminal proceeding instituted by the government.

In preparing their case against Jones, the police had also questioned Victor Harvey, a fifteen year old juvenile who had been present at the August 7, 1970 shootings. Pursuant to

police questioning, Harvey prepared a written statement for police which recounted the events of that evening as he recalled them. In his statement, Harvey made no references at all to a red-alert meeting. Nor did he mention Jones' involvement in the shootings. In fact, nowhere in his written statement did Harvey mention Jones, except to identify Jones from a photograph police showed him.

The defense made specific requests for the production of Harvey's statement for possible use in the criminal proceeding. The defense made one such request at a pretrial hearing and another at the beginning of the trial. On both occasions, the prosecution refused to give defense counsel Harvey's statement, contending that the statement was neither favorable to the defense nor sufficiently material to compel production under Brady v. Maryland, 373 U.S. 83 (1963).

Ultimately, defense counsel decided not to call Harvey as a witness. Undoubtedly, counsel inferred from the prosecution's response to his production request that Harvey's testimony would have been damaging to Jones' case.

In March of 1972, at a trial before the Court of Common Pleas for Cuyahoga County, Ohio, the jury found Harllel Jones, the plaintiff herein, guilty of second-degree murder and shooting with intent to kill or wound. Plaintiff had been incarcerated upon his arrest in October of 1971, and remained so after his conviction.

B.

Subsequently, after exhausting all of the state appellate procedures, plaintiff filed with this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. After conducting an evidentiary hearing on

various claims included in the petition, this Court entered its Memorandum Opinion and Order on February 10, 1977. The Court found that plaintiff was entitled to a writ of habeas corpus based on the prosecution's suppression of the statement made by Victor Harvey. Jones v. Jago, 428 F.Supp. 405 (N.D. Ohio 1977). The Memorandum Opinion and Order was self-executing and provided for the release of plaintiff within ninety days if the State failed to institute new proceedings against him. The State did not institute new criminal proceedings. However, it did appeal this Court's decision to grant the petition for writ of habeas corpus. On April 19, 1977, the United States Court of Appeals for the Sixth Circuit granted the State's motion for a stay of judgment pending appellate review of this Court's Order granting Jones' habeas petition.

On May 3, 1978, the Sixth Circuit

affirmed this Court's decision granting the petition for writ of habeas corpus. Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978). The State then petitioned the United States Supreme Court for a writ of certiorari. The petition was denied on October 2, 1978. Jago v. Jones, 439 U.S. 883 (1978). There is nothing in the record to indicate that any stay was in effect pending the Supreme Court's ruling on the petition for writ of certiorari.

On June 24, 1977, pursuant to the Memorandum Opinion and Order entered on February 10, 1977, this Court set bond for the plaintiff, thus clearing the way for his release. In the Order of June 24th, this Court determined that

> Under the circumstances, continued imprisonment of the [plaintiff] by the state can no longer be justified. The [plaintiff] is possessed of a final judgment that his trial did not meet constitutional standards of fairness and is by now entitled to release on bail while the state pursues its appeal. (Emphasis added)

Quoted in Jago v. U.S. District Ct., 570 F.2d 618, 619 (6th Cir. 1978). The prosecution appealed plaintiff's release to the Sixth Circuit. The Sixth Circuit issued its opinion on February 2, 1978. In rejecting the prosecution's challenge to plaintiff's release, the Sixth Circuit found that:

> A consideration of the historical role of habeas corpus generally and of Rule 23 in particular persuades us that Judge Battisti retained the power to release Jones under the circumstances here.
>
> * * *
>
> Any consideration of the meaning of Rule 23 and of the retained authority of the district judge to enter orders affecting custody after filing of the notice of appeal must begin with the recognition that '[e]ssentially, the proceeding is unique'....

Jago v. U.S. District Ct., supra at 620. Furthermore, the Sixth Circuit noted in its opinion that, "Harllel Jones was actually released on June 24, 1977,

pursuant to the district court's order." Jago v. U.S. Dist. Ct., supra at 619, n. 1.

On February 12, 1979, a final order was entered by this Court unconditionally releasing Jones and removing all restrictions imposed on him by way of the Court's bond Order.

C.

On October 29, 1979, plaintiff instituted the above-captioned action, invoking jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiff's complaint included fifteen (15) counts and alleged federal causes of action arising under 42 U.S.C. §§ 1983,[1]

[1] 42 U.S.C. § 1983 (1976) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state..., subjects or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

1985(2),[2] 1985(3)[3] and 1986,[4] the First, Fourth, Sixth, Eighth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments to

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shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

[2]42 U.S.C. § 1985(2) (1976) provides in pertinent part:

If two or more persons in any state...conspire...for the purpose of impeding, hindering, obstructing, or defeating, in any matter, the due course of justice in any state..., with intent to deny any citizen the equal protection of the laws....

[3]42 U.S.C. § 1985(3) (1976) provides in relevant part:

If two or more persons in any state...conspire...for the purpose of depriving, either directly or indirectly, any person...of the equal protection of the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[4]42 U.S.C. § 1986 (1976), see note 5, infra.

the United States Constitution, as well as various state claims. This action was filed against three police officers who had investigated the shootings and had amassed evidence for the criminal prosecution ("City defendants"), two F.B.I. agents who had aided in the investigation ("Federal defendants"), the county itself and the county prosecutors who had represented the State in the criminal prosecution ("County defendants"), and Robert Perry who had acted as an informant.

In essence, plaintiff's claims are based on the theory that the defendants, acting both individually and in concert, intentionally suppressed evidence which was favorable to his case, allowed perjured testimony to be presented at his trial, and caused a conflict of interest on the part of his defense counsel by making Robert Perry his co-defendant.

Plaintiff claims that these alleged activities were undertaken by the defendants with either actual or constructive notice that they were violating his constitutional rights, and that it was only through such activities that his conviction was obtained. Further, plaintiff asserts various pendent claims under such law which include malicious prosecution, false imprisonment, invasion of privacy, defamation, abuse of process and violation of state civil rights laws.

In response to plaintiff's complaint, various motions have been filed by the defendants. The County and Federal defendants have filed motions to dismiss. A motion for summary judgment is pending on behalf of the City defendants. The Magistrate, in his Report and Recommended Decision, suggested that all of the defendants

share the common defense of the statute of limitations, although such defense was not specifically raised by the County defendants. It is within the statute of limitations defense that the Court will begin its analysis.

II.

STATUTE OF LIMITATIONS DEFENSE

A. Applicable Limitations Period.

As a general rule, statutes of limitations are essential to the efficient operation of the judicial system and, as such, should be strictly construed. Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 478 (1980). Statutes of limitations were never intended to be mere technical requirements subject to the manipulation of the parties. While there are numerous areas of the law wherein flexibility and discretion enter

into a court's analysis, statutes of limitations are strictly adhered to. In the instant matter, however, the statute of limitations does not offer its usual clear path to a decision.

The plaintiff has made claims that both his civil rights and constitutional rights have been violated by the defendants, acting either individually or in concert. These alleged violations fall within the realm of 42 U.S.C. §§ 1983, 1985(2), 1985(3) and 1986.[5] While

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[5] 42 U.S.C. § 1986 (1976) is governed by a one year statute of limitations. 42 U.S.C. § 1986 provides in pertinent part:

Action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the

no federal statute of limitations has been prescribed to govern actions arising under 42 U.S.C. §§ 1983, 1985(2) and 1985(3), such actions are governed by the provisions of 42 U.S.C. § 1988. Relevant portions of § 1988 read as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as

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case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action;... But no action under the provisions of this motion shall be sustained which is not commenced within one year after the cause of action has accrued. (Emphasis added).

> the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.... (Emphasis added.)

Specifically, § 1988 provides that common law or a consistent state statute shall apply where no federal statute of limitations has been enacted by Congress.

In applying § 1988 to civil rights actions for which there is no statute of limitations, it has been noted that "[w]hen such a void occurs, [c]ourts have repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. at 484. The Sixth Circuit has adopted this view and has specifically determined that "...the district court must apply the limitations statute of the state where it sits 'which would be applicable in the most closely analogous state action.'" Kilgore v. City of Mansfield, Ohio, 679 F.2d 632,

633-34 (6th Cir. 1983) (Citations omitted). See also Sutton v. Bloom, 710 F.2d 1188 (6th Cir. 1983); Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977); Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975); Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972). In determining the analogous statute of limitations to be applied to a particular claim for relief, the court should take into consideration the operative facts out of which the claim arises, as well as the interest that plaintiff seeks to protect. Schorle v. City of Greenhills, 524 F.Supp. 821 (S.D. Ohio 1981). This case-by-case method of analysis is appropriate in determining the statute of limitations applicable to the above-captioned cause of action.

Plaintiff, in his objections to the Magistrate's Report, relies on cases which suggest that the "borrowing" of an analogous state statute of limitations

precipitates inconsistent and confusing results.[6] Essentially, plaintiff argues that a cause of action based on civil rights legislation differs from a state cause of action in the purpose for which it was recognized by Congress and in the underlying elements which must be proven. Further, plaintiff submits that drawing analogies between each of plaintiff's claims and the common law torts encompassed within the state statutes of limitations requires "a separate analysis of each claim." See Plaintiff Jones' Objections to the Magistrate's Report and Recommended Decision, p. 6. Plaintiff claims that, for these reasons, the application of the analogous state limitations period is inappropriate in this case. The Court disagrees.

Several Ohio statutes of limitations are offered by plaintiff as those which

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[6] Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982); Shouse v. Pierce County, 559 F.2d

should be considered applicable to the instant matter. These statutes include limitations which range in length from one year to six years and apply to a variety of tort actions:

B. Parallel State Statutes of Limitations.

First, plaintiff has suggested that Ohio Revised Code § 2305.07 sets forth the applicable statute of limitations for the instant matter. The relevant portion of § 2305.07 reads as follows:

> § 2305.07 Contract not in writing.
>
> [A]n action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

The plaintiff suggests that in the event the Court rejects as the applicable limitations period the time bar set out in Ohio Rev. Code § 2305.07, Ohio Rev. Code § 2305.09 applies. Ohio Rev. Code §

1142 (9th Cir. 1977).

2305.09 provides for a four-year statute of limitations for various tort actions. That section reads in pertinent part as follows:

> §2305.09 Four years; certain torts.
>
> An action for any of the following causes shall be brought within four years after the cause thereof accrued:
>
> ...(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code....

Plaintiff further suggests that Ohio Rev. Code § 2305.10 should apply in this case if §§ 2305.07 and 2305.09 are deemed inapplicable. Ohio Rev. Code § 2305.10 reads:

> § 2305.10 Bodily injury or injury to personal property.
>
> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose....

While §§ 2305.07, 2305.09, and 2305.10 encompass an array of causes of

action, they are not the most closely analogous state statutes to the federal statutes relied upon in instituting the instant civil rights matter. Nowhere in any of the aforementioned provisions of the Ohio statutes are clear state analogues to the civil rights claims underlying plaintiff's action set forth. See Board of Regents of the University of New York v. Tomanio, supra.

Ohio Rev. Code § 2305.11 sets forth another statute of limitations period. The defendants assert, and the Magistrate recommends, that § 2305.11 sets forth the time bar most analogous to the plaintiff's underlying allegations. Ohio Rev. Code § 2305.11 reads in pertinent part as follows:

> § 2305.11 Time limitations for bringing certain actions; definitions.
>
> (A) An action for libel, slander, assault, battery, malicious

> prosecution, [or] false imprisonment ...shall be brought within one year after the cause thereof accrued....

This section of the Ohio Revised Code specifically refers to actions for libel, malicious prosecution and false imprisonment, three of the main underlying claims comprising plaintiff's action. The limitations sections profered by plaintiff make no reference to any specific allegations which plaintiff set forth in his complaint and are applicable only in a general sense. Section § 2305.11 provides "[o]n its face...'the most closely analogous' limitations for the factual predicate of plaintiff's complaint..." since it explicitly sets forth actions for libel, malicious prosecution, and false imprisonment. Kilgore v. City of Mansfield, Ohio, supra at 634. This Court finds that Ohio Rev. Code § 2305.11 is the applicable statute of limitations governing plaintiff's civil rights

action. It meets the test set forth in Board of Regents of the University of New York v. Tomanio, supra. See also Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977); Carmicle v. Weddle, supra; Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964); Mason v. Owens-Illinois, Inc., supra.

C. Tolling Provisions.

The Court's conclusion that Ohio Rev. Code § 2305.11 applies to the instant matter does not exhaust consideration of the statute of limitations defense. Ohio Rev. Code § 2305.16 provides for a tolling period under certain circumstances. Section 2305.16 reads in pertinent part as follows:

> § 2305.16 Disabilities; tolling of statute of limitations.
>
> Unless otherwise specially provided in sections 2305.04 to 2305.14, inclusive, and sections 1302.98 and 1304.29 of the Revised Code, if a person entitled to bring any action mentioned in such sections, unless for penalty or forfeiture, is, at the time the

> cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring it within the respective times limited by such sections, after such disability is removed....

Plaintiff argues that the term "imprisonment" extends to more than actual confinement and includes any restraint imposed as a condition of release on bond. Defendants reject plaintiff's contention and assert that the term "imprisonment" should be narrowly construed to refer to physical imprisonment. This Court need not address this issue to rule on the motions currently before it.

Were the Court to accept as true plaintiff's assertion that "imprisonment" extends beyond confinement, the complaint in this case still would have been untimely filed. The Supreme Court denied certiorari on October 2, 1978. That Order was affirmed by Justice Stewart's refusal to suspend the denial of certiorari on October 16, 1978. The

denial of certiorari represented the highest rung on the ladder of appellate review. The State's case was effectively laid to rest when certiorari was denied. Although this Court's final Order was not issued until February 12, 1979, by virtue of the denial of certiorari, the plaintiff was free from any restraint as of October of 1978. In fact, this Court's Order of February 12, 1979, was nothing more than an administrative act to close the case file. Thus, even if the conditional release on bond tolled the running of a statute of limitations, any constraint resulting therefrom would have been removed by the denial of certiorari, the State's last appellate alternative.

The plaintiff's complaint was filed with the Court on October 29, 1979, over one year after the Supreme Court's denial of certiorari. Viewing the tolling question in a light most favorable to

plaintiff, once the Supreme Court had denied certiorari, the statute of limitations could no longer be tolled pursuant to § 2305.16 of the Ohio Rev. Code. It is on this basis that the Court grants the motion to dismiss on behalf of the Federal defendants, the motion for summary judgment on behalf of the City defendants, and dismisses Defendant Robert Perry.[7]

D. Waiver of Statute of Limitations Defense.

The next issue in the disposition of this case is whether the statute of limitations defense provided for in Ohio Rev. Code § 2305.11 was waived by the County defendants when they failed to raise it in a pre-answer motion to dismiss. In this regard, the Court must first look to Rule 8(c) of the Federal

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[7]Perry effectively raised the statute of limitations defense in his Answer to plaintiff's Complaint.

Rules of Civil Procedure for guidance. In pertinent part, Rule 8(c) reads as follows:

> In pleading[8] to a preceding pleading, a party shall set forth affirmatively...statute of limitations...and any other matter constituting an avoidance or affirmative defense....

However, Rule 8(c) is somewhat modified by Rule 12(b) of the Federal Rules of Civil Procedure:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be

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[8]The term "pleadings" is defined in Rule 7(a) of the Federal Rules of Civil Procedure:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

> made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion ....

Therefore, while Rule 8(c) designates pleadings as the usual method for raising an affirmative defense, Rule 12(b) permits certain affirmative defenses to be raised by way of motion. Rule 8(c) sets forth the usual method of raising a statute of limitations defense through pleading and Rule 12(b) provides for alternative methods of raising specified defenses. When a motion to dismiss is filed prior to an answer by a party, as provided in Rule 12(c), the motion, in

effect, tolls the time period in which to file an answer or other pleading with the Court.[9]

The statute of limitations defense is not one of the affirmative defenses specifically listed in Rule 12(b) of the Federal Rules of Civil Procedure. Thus, based on a reading of the rules themselves, it remains unclear as to whether the defense of statute of limitations, in fact, is properly asserted in a motion to dismiss. Moreover, on their face, the rules do not address the question of whether a party

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[9]Rule 12(a) of the Federal Rules of Civil Procedure provides in pertinent part:

...The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

waives a statute of limitations defense when the party fails to raise it in its motion to dismiss. It is essential to consult case law analyzing the interaction of Rules 8(c) and 12(b) in order to determine what effect failure to raise the defense of statute of limitations in a pre-answer motion to dismiss has on the applicability of the defense itself.

1. Methods of Asserting Defense and Waiver.

Whether a party can raise a statute of limitations defense in a motion to dismiss varies from case to case. While it is generally accepted that this defense may be raised in such a motion, this method should only be used when a defect is apparent on the face of the complaint. Partis v. Miller Equipment Co., 324 F.Supp. 898 (N.D. Ohio 1970); Wells v. Place, 92 F.Supp. 473 (S.D. N.Y.

1950). While these cases indicate that the defense can be raised in a motion, they do not address the specific issue of whether the defense is waived if not raised in a pre-answer motion to dismiss.

Since an Ohio Code limitations period applies to the above-captioned action, this Court must look to Ohio law for guidance in resolving this issue. In 1970, prior to the effective date of the Ohio Rules of Civil Procedure, the Ohio Supreme Court, in Aetna Casualty & Surety Co. v. Hensgen, 22 Ohio St. 2d 83, 258 N.E. 2d 237 (1970), noted that statutes of limitations are "personal privilege" defenses which are subject to waiver if not properly asserted. The Sixth Circuit in Hayden v. Ford Motor Co., 497 F.2d 1292, 1294 (6th Cir. 1974), found it necessary to expand upon the "personal privilege" theory set forth in Aetna Casualty & Surety Co. v. Hensgen, supra,

and reaffirmed the generally accepted view that "statutes of limitations are designed primarily for the benefit of persons against whom claims may be made and, in consequence, are personal privilege defenses that are waived unless asserted at the earliest possible moment."[10] The County defendants failed to raise the statute of limitations defense at the earliest possible moment. Thus, the defense has been waived and the

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[10] See also Kraushaar v. Leschin, 4 F.R.D. 143 (E.D. Pa. 1943), and 53 C.J.S. § 24 Limitations of Actions, which reads as follows:

Since a statute limiting the time within which actions shall be brought is for the benefit and repose of individuals and not to secure general objects of policy or morals, and it is regarded as a personal privilege, it is a general rule that the protection may be waived by one entitled to rely on it, unless the statutory provision is jurisdictional, or goes to the right of action, and broadly speaking the rule as to waiver applies in respect of the bar of any statute which is a mere restriction on the remedy as distinguished from a limitation on the right.

County defendants must rely on their proffered defense of immunity from civil liability as the basis of their motion to dismiss.

VI.

IMMUNITY FROM CIVIL LIABILITY

In their motion to dismiss, the County defendants argue that the County and the County prosecutor are absolutely immune from prosecution for the alleged deprivation of Jones' constitutional rights although they initiated the criminal prosecution that resulted in his conviction. Plaintiff contends that the County is not entitled to absolute immunity and that the Court must look to the functional aspects of the County's actions and not rely merely on their status as the prosecutorial arm of the government. Further, plaintiff argues that if the County is entitled to any immunity at all, it would be "qualified

immunity" rather than "absolute immunity" and, as such, would require a good faith showing on the part of the defendants in order to prevail as an affirmative defense. Specifically, plaintiff relies on Gomez v. Toledo, 446 U.S. 635 (1980), in which a police officer brought a civil rights action against the police department based upon claims of wrongful discharge and malicious criminal prosecution. The Supreme Court found that the police department was entitled to assert the defense of qualified immunity and had the initial burden of proving that all acts were done in good faith and within the scope of official duties. If a private interest was being pursued in bad faith, the cloak of immunity would not shield the official asserting the defense from civil liability. Gomez, supra at 637.

It has long been recognized that various public officials are clothed with

immunity from civil rights actions.[11] Immunity has its origins in the common law. Essentially, qualified immunity may be asserted as an affirmative defense by government officials or agenies [sic]. See Pierson v. Ray, supra at 556-557. Much like the statute of limitations defense discussed above, qualified immunity must be asserted pursuant to Rule 8(c) of the Federal Rules of Civil Procedure. Plaintiff contends that the County defendants cannot merely hide behind their status as a governmental entity, but must offer proof that their actions in pursuing his prosecution were within the scope of their public authority and were properly exercised.

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[11] Procunier v. Navarette, 434 U.S. 555 (1978)(prison officials); Imbler v. Pachtman, 424 U.S. 409 (1976)(prosecutors); Wood v. Strickland, 420 U.S. 308 (1975)(school officials); Scheuer v. Rhodes, 416 U.S. 232 (1974)(state governor and state executive officers); Pierson v. Ray, 386 U.S. 547 (1967)(judges); Tenney v. Brandhove, 341 U.S. 367 (1951)(legislature).

After reviewing the pleadings and motions in this case, as well as the precedent in the area, the Court finds that the doctrine of absolute immunity applies to the County defendants herein and, as such, serves as a complete defense to plaintiff's claims.[12]

Historically the Supreme Court has recognized that the officers of the legal system, in order to operate efficiently, must be free from the threat of civil liability. While, initially, immunity was extended only to judges, Pierson v. Ray, supra, it quickly expanded to include government officials accorded "quasi-judicial" authority. See Scheuer

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[12] It is worthy of note that plaintiff contends that the leading case in the area of prosecutorial immunity, Imbler v. Pachtman, supra, applies strictly to actions involving claims based on § 1983. However, if this limitation were true, plaintiff's key case, Gomez v. Toledo, supra, would similarly be subjected to this narrow restriction. These cases were not intended to be applied so narrowly.

v. Rhodes, supra. The authority of prosecutors is "quasi-judicial" in nature.

The official public function of a prosecutor is to initiate and pursue criminal prosecutions. In analyzing the function of such a position, it is noteworthy that:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case.... The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of his office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.

Pearson v. Reed, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935), as quoted in Imbler v. Pachtman, supra at 423-424.

In essence, there is a strong precedent for shielding from civil suits prosecutors in the exercise of their public function. If such immunity did not exist, the prosecutor's office would be unable to function: Prosecutorial decision-making would be hampered by fear of exposure to civil liability. Without immunity, the prosecutors' attention would be diverted from professional responsibilities to defending themselves against innumerable claims initiated by individuals against whom criminal actions have been brought.

The Magistrate concluded, without discussion, that the County defendants were immune from plaintiff's claims because they are based on defendant's

actions as prosecutors. Specifically, the Magistrate cites Imler [sic] v. Pachtman, supra, in support of his conclusion. Plaintiff, on the other hand, argues that the claim of immunity stems only from defendants' prosecutorial "status" and not the actual activities which are the basis of the allegations contained in the complaint. The Supreme Court in Imbler held that a prosecutor enjoys absolute immunity from a § 1983 civil suit for damages for functions relating to "initiating a prosecution and [ ] presenting the State's case." 424 U.S. at 431. The Supreme Court went on to distinguish the functional nature of a prosecutor's activities from his or her status, and emphasized that its ruling encompassed those activities "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Although it did not decide the issue, the Court's discussion suggests that a

prosecutor may not be immune, or might enjoy only qualified immunity at most, for activities characterized as administrative or investigative. 424 U.S. at 430-33. Plaintiff cites many cases which, in essence, reflect the exceptions to the general rule of immunity. Most of these cases suggest that a prosecutor exposes himself to the threat of civil liability when he steps out of his generally accepted function and into an area of activity within the realm of another public official. Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), aff'd, 452 U.S. 713 (1981)(per curiam)(prosecutor authorized unlawful investigation technique); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974)(prosecutor aided in raid). While these cases to indicate a significant trend toward imposing liability when a public official steps

out of his publicly proscribed role, such is not this case. The Court finds that the theory of immunity set forth in Imbler v. Pachtman, supra, applies to the instant case. No issue of material fact exists which would indicate that the County defendants were not acting within the scope of their official status as prosecutors. Throughout the course of the criminal prosecution, the county prosecutors maintained their "quasi-judicial" role and did not enter into the investi-gation [sic] of plaintiff's criminal case. Thus, the County defendants are absolutely immune from civil suit.

Finally, the County itself cannot be found liable for the acts of its employees when the employees are properly exercising their proscribed official duties. A county is not liable for the vicarious acts of its employees. See Maynard v. Kear, supra; Monell v.

Department of Social Services, 436 U.S. 658 (1978). It is under this theory that the County is dismissed as a defendant in this case.

VII.

CONCLUSION

For the reasons set forth above, it is hereby ordered that the County defendants' motion to dismiss, the Federal defendants' motion to dismiss and the City defendants' motion for summary judgment are granted. It is further ordered that the action against defendant, Robert Perry, is hereby dismissed.

IT IS SO ORDERED.

Frank J. Battisti
Chief Judge

JOURNAL ENTRY OF THE CUYAHOGA COURT OF COMMON PLEAS

STATE OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO

PLAINTIFF

vs.

Harlell Jones

DEFENDANT

IN THE COURT OF COMMON PLEAS

SEPTEMBER TERM, 1978

TO-WIT: October 17 , 1978

NO. CR 01961

INDICTMENT MURDER FIRST DEGREE w/ct SHOOTING

(RECEIVED FOR FILING OCT 27, 1978)

JOURNAL ENTRY

State of Ohio present in person of John T. Corrigan Prosecutor, Attorney of Cuyahoga County or of Mr. Corrigan and

for good cause shown charge in indictment be and is hereby nolled.

James F. Kilcoyne, Judge
sd 10/20

Judge_____
VOL 337 PG 311 Journal Book

Respectfully submitted,

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